

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of
Eschelon Telecom, Inc. Against Qwest
Corporation, Inc.

RECOMMENDATION ON
MOTIONS FOR
SUMMARY DISPOSITION

On May 2, 2003, Eschelon Telecom of Minnesota, Inc. ("Eschelon") filed a Complaint with the Minnesota Public Utilities Commission ("MPUC") alleging that Qwest Corporation, Inc. ("Qwest") overcharged Eschelon for 40 amp power feeds and cageless space preparation, and also alleging that Qwest refused to provide Eschelon with all of the Direct Measure of Quality (DMOQ) billing credits Eschelon claimed were due. On May 20, 2003, Qwest filed its Answer to Eschelon's Complaint. On June 16, 2003, a briefing schedule was set for addressing the issues raised in Eschelon's Complaint.

On September 3 and 4, 2003, Eschelon and Qwest filed their initial briefs; Eschelon requested summary judgment. Eschelon, Qwest and the Department of Commerce filed reply briefs. Final submissions were received on September 29, 2003.

Jason D. Topp and Joan C. Peterson, Attorneys at Law, 200 South Sixth Street, Room 395, Minneapolis, MN 55402, appeared on behalf of Qwest. Dennis D. Ahlers and Brent L. Vanderlinden, Attorneys at Law, 730 Second Avenue South, Suite 1200, Minneapolis, MN 55402-2456, appeared on behalf of Eschelon. Ginny Zeller, Assistant Attorney General, 445 Minnesota Street, Suite 1400, Saint Paul, MN 55101, appeared on behalf of the Department of Commerce ("Department").

Based on the memoranda and file herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED:

1. That Eschelon's Motion for Summary Judgment be granted, in part. Eschelon should receive the benefit of rates set by the Commission for 40 amp power service and cageless space preparation. The parties shall notify the Administrative Law Judge by November 18, 2003 if the amount of the refund due Eschelon is in dispute.
2. That Eschelon's Motion for Summary Judgment be denied in part. Eschelon should not receive DMOQ credit for Qwest's billings for UNE-E.

3. That the Protective Order issued July 10, 2003 remain in effect.

Dated this 5th day of November, 2003.

/s/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, any party adversely affected by this Report, may file exceptions to it within 20 days of the mailing date hereof. Exceptions should be filed with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 - 7th Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply. An original and 15 copies of each document should be filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions, or after oral argument, if held.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that the recommendation has no legal effect unless expressly adopted by the Commission as its final order.

MEMORANDUM

I. Background

Congress enacted the Telecommunications Act of 1996 to foster competition in local telephone service. It imposed certain requirements on incumbent local exchange carriers (ILECs), such as Qwest, to facilitate competing telecommunications carriers (CLECs) entering the market. ILECs must provide requesting telecommunications carriers interconnection, unbundled network elements, and services for resale. Section 252 of the Act sets out the procedures for an incumbent carrier to enter into a voluntary agreement with a competing carrier. Such agreements must be submitted for approval to the appropriate state utilities commission, and are subject to enforcement by the states.^[1] Qwest has entered into an interconnection agreement (ICA) with Eschelon, and the Public Utilities Commission (PUC) has approved that agreement.^[2]

Eschelon filed a complaint with the PUC on May 2, 2003, alleging, *inter alia*, that Qwest overcharged Eschelon for non-recurring rates for 40 amp feeds and cageless space preparation fees when Eschelon built its collocations in Minnesota in 1999 and 2000. Eschelon also alleged that Qwest had refused to provide Eschelon with billing credits due to Eschelon under the parties' February 2000 Stipulation and Agreement and August 25, 1999 Interconnection Agreement. Eschelon claims that Qwest has not provided regular, accurate billings to Eschelon for unbundled network elements, referred to as UNE-Star or UNE-E. Qwest denied that it owed Eschelon a refund for past collocation charges. It also denied that Eschelon received inaccurate billings. On June 2, 2003, the Public Utilities Commission issued a Notice and Order for Hearing, referring this matter to the administrative law judge. At the request of the parties, a Protective Order was issued on July 10, 2003.

II. Standard for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.^[3] The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition of contested case matters.^[4]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.^[5]

In this case, the facts are set forth in the documents filed by the parties in support of their motions. Although the parties do not assert that there are facts in dispute, if reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.^[6]

III. Collocation Charges

The following material facts are not in dispute.

1. Eschelon and Qwest entered into an Interconnection Agreement (ICA) that was approved by the PUC on October 4, 1999. It included provisions concerning collocation. "Collocation" is defined as "the right of [Eschelon] to obtain dedicated space in [Qwest's] Local Serving Office (LSO) or at other [Qwest] locations and to place equipment in such spaces to interconnect with [Qwest's] network. Collocation also includes [Qwest] providing resources necessary for the operation and economical use of collocated equipment."^[7]

2. ICA Paragraph 41.1 states that all current services and new and additional services will be priced in accordance with the Telecommunications Act and its rules, and orders of the Federal Communications Commission (FCC) and the PUC.^[8]

3. For collocation, ICA Paragraph 41.11 states that the parties must “use the FCC proxy rates in 47 CFR § 513(c)(6) for collocation costs on an interim basis subject to true up.”^[9] The ICA contains Schedule 3, “Physical and Virtual Collocation Prices,” that states that “[R]ates are interim and subject to true up based on further Commission proceedings.”^[10]

4. In January, 2000 Qwest and Eschelon entered into a Second Amendment to their ICA.^[11] The Second Amendment replaced the collocation terms and pricing in the ICA with amended collocation terms and pricing, including rates for 40 amp power feeds, and cageless space preparation.^[12]

5. The Second Amendment states:

All costs will be those costs and cost elements approved by the MPUC, in either the AT&T Contract or, to the extent applicable, interconnection arbitration or generic cost dockets. To the extent that a rate element or rate is modified or not allowed under current MPUC rulings or in any MPUC Cost Order, the MPUC’s determination will govern.... Any cost for which there is no currently applicable MPUC approved rate shall be developed by [Qwest] and subject to acceptance by [Eschelon].^[13]

6. Attachment B to the Second Amendment sets forth collocation rates, including rates for the 40 amp power delivery, and for Cageless Physical Collocation.^[14] The Second Amendment also contains a Dispute Resolution section. It states, in applicable part:

The Parties further agree that all cost disputes may be resolved through the Dispute Resolution section of this agreement and that final decisions of the MPUC in cost docket or other proceedings will govern the final determination of all cost issues, including the “true-up” of costs already billed and collected.^[15]

7. Under the provisions of the Second Amendment, Eschelon bargained for terms that assured it would pay at rates approved by the MPUC.

8. On May 3, 1999, the PUC issued its Order Resolving Cost Methodology, Requiring Compliance Filing, and Initiating Deaveraging Proceeding. Rates were effective June 30, 2000. The Order addressed some collocation charges but did not set prices for 40-amp power delivery or cageless space preparation.^[16]

9. In 1999 and 2000, Eschelon ordered and paid for certain collocation build-outs.^[17]

10. On March 19, 2001, Eschelon and Qwest entered into a Confidential Second Amendment to Confidential Trade Secret Stipulation addressing five categories of claims: billing, migration from resale to platform, pricing, and reciprocal compensation. Specifically, Quest agreed to pay Eschelon \$1,176,000.00 and Eschelon agreed to release all of the following claims:

- a. reciprocal compensation for usage between March 1, 2000 and September 30, 2000;
- b. for all periods prior to March 1, 2001, true-ups pursuant to decisions of the [MPUC] in [the Generic Cost Docket], including for collocation and unbundled network elements...;
- c. for all periods prior to March 1, 2001, true-ups for any resale wholesale discounts that have or may be ordered by the [MPUC] or other regulatory or judicial body in, or related to, Minnesota docket number P-999-CI-99-776;
- d. the revenue Qwest billed to IXCs at Qwest's established switched access rates for Eschelon platform end users for usage for the period between October 1 through October 31, 2000; and
- e. platform billing for all periods prior to March 1, 2001.^[18]

11. Subsequent paragraphs more fully describe the release of claims, and refer back to the "billing disputes/matters addressed herein."^[19]

12. Qwest and Eschelon agree that the dispute in this proceeding centers on (b) above: "for all periods prior to March 1, 2001, true-ups pursuant to decisions of the [MPUC] in [the Generic Cost Docket]."^[20]

13. Prices for 40-amp power delivery and cageless space preparation were set in a subsequent proceeding. The scope of the Notice and Order for Hearing in Onvoy, directs the ALJ to determine what prices the Commission should establish "for any service that the ALJ determines is not explicitly covered by an existing Commission Order...."^[21] As a part of the Onvoy proceeding, the ALJ set a price for 40-amp power feed and cageless space preparation. That determination was adopted by the MPUC.^[22]

14. In a subsequent generic cost proceeding ("1375 Generic Cost Proceeding") the MPUC set the generic price at the Onvoy price for 40-amp power delivery, and set the cageless space preparation price at \$0. The PUC directed Qwest to true-up rates back to April 4, 2002.^[23]

15. Although Qwest voluntarily agreed to true-up rates farther back than April, 2002 for some Minnesota CLECs, it did not extend that offer to Eschelon, apparently because of its position that Eschelon had waived its right to true-up in the Settlement Agreement.^[24]

16. Eschelon requests a refund of \$430,790, plus 6% interest.^[25] The parties have exchanged information about the exact amount in dispute.^[26]

DISCUSSION

The analysis of the disputed prices rests upon the Second Amendment to the Qwest and Eschelon ICA. The Second Amendment replaced any collocation terms in the initial ICA. It was specific about the collocation elements it covered and specifically listed 40 amp power delivery and “cageless physical collocation.”^[27]

The Second Amendment clearly states that the prices set were subject to costs “approved by the MPUC, in either the AT&T Contract or, to the extent applicable, interconnection arbitration or generic cost dockets.”^[28] Furthermore, the agreement incorporates subsequent price modifications. It states: “To the extent that a rate element or rate is modified under current MPUC rulings or in any MPUC Cost Order, the MPUC’s determination will govern...”^[29] Eschelon and Qwest’s pricing was negotiated to take advantage of any rate change approved by the MPUC. This is reiterated in the Dispute Resolution section of the Second Amendment. It states: “[F]inal decisions of the MPUC in cost dockets or other proceedings will govern the final determination of all cost issues, including the ‘true-up’ of costs already billed and collected.”^[30] Paragraphs 6.1 and 21.1 of the Second Amendment specifically allow modifications to the rates Eschelon must pay Qwest

Although Qwest and Eschelon entered into a Confidential Stipulation and Eschelon waived certain claims, Qwest’s reliance on that waiver is misplaced. Eschelon waived claims for prices set in the Generic Cost Docket, but as Eschelon correctly points out, rates for 40 amp power delivery and cageless space preparation were not set in the Generic Cost Docket.^[31]

Although Qwest is correct that the Generic Cost docket developed a methodology for setting a price for these elements, neither price was specifically set until the Onvoy proceeding. In that case, the ALJ found that certain elements, including 40-amp power delivery and cageless space preparation, were not set in the Generic Cost Docket, and proceeded to set those rates.^[32] In addition, the ALJ concluded in Onvoy that Qwest rejected the AT&T/MCI model approved by the PUC in the Generic Cost Docket in favor of its own rates, thus violating its obligation to provide collocation on rates, terms, and conditions that are just, reasonable and nondiscriminatory as required by 47 U.S.C. § 251(c)(2)(1)(D).^[33]

Qwest may not claim the protection of the Generic Cost Docket when it has been determined that Qwest made no efforts to apply the methodology approved in that proceeding to the rate elements at issue here, and, instead, opposed the use of that methodology. The Commission approved the ALJ’s report, including the rates set for power delivery and cageless space preparation.

Qwest failed to include the disputed rate elements in its Generic Cost Docket compliance filing dated April 14, 2000. This further supports Eschelon’s claim that the disputed rate elements in this case were not addressed in the Generic Cost Docket.

In a subsequent cost docket, the “1375 Generic Cost Proceeding,” the prices for 40 amp power delivery and cageless space preparation were addressed again, and

changes were made. The Commission directed Qwest to true-up rates back to April, 2002. Eschelon is entitled to the benefit of this proceeding as well.

In the Second Amendment, Qwest and Eschelon agreed that rates would be modified to comply with MPUC orders. This extended to true-up of costs already billed and collected. Thus, Eschelon is entitled to benefit from both the Onvoy decision and the 1375 Generic Cost Proceeding.

The Department attempts to distinguish “any MPUC cost order” from “generic cost docket.” Although it is consistent with the MPUC’s orders to conclude that an order in a generic cost docket applies broadly to a class or group, it does not necessarily follow that a “cost order” in a docket pertaining to specific named parties applies only to the named parties. In this case, the language of the Second Amendment gives Eschelon the benefit of any price modifications, not only in widely applicable proceedings like the generic cost dockets, but also in any MPUC cost order. The provision’s broader application is clear when read in conjunction with the dispute resolution provisions of the Second Amendment, stating that final decisions of the MPUC in cost docket or other proceedings will govern the final determination of all cost issues. The terms of the Amendment assure that Eschelon will get the best rate approved by the Commission. This is consistent with the provisions of the Telecommunications Act that prohibit rate discrimination.^[34]

The precise amount of the refund Qwest owes Eschelon is not clear. In its initial brief, Eschelon requested a refund of \$430,790, plus six percent interest. It supported that claim with Exhibits C-6 through C-11. Qwest did not submit any additional evidence. It cannot be determined from the exhibits presented if there is a dispute concerning the amount of the refund. The parties will be given the opportunity to address this issue.

IV. Billing DMOQ’s

The following material facts are not in dispute.

1. The parties’ ICA provided for a system of Direct Measures of Quality (DMOQs) of Qwest’s provision of service to Eschelon, and a system of inter-carrier credits for Qwest’s breaches of service quality. One of the DMOQs is B-4, “Accuracy of Mechanized Bill Format – Wholesale.”^[35]

2. Section 12 of the ICA states in part:

The Parties agree that in order to ensure the proper performance and integrity of the entire Connectivity Billing process, [Qwest] will be responsible for and accountable for transmitting to [Eschelon] an accurate and current bill. [Qwest] agrees to implement control mechanisms and procedures to render a bill that accurately reflects the Elements, Combinations and Local Services ordered and used by [Eschelon].

3. On March 1, 2000, the parties entered into a Stipulation and Agreement that, among other things, amended the DMOQ provisions of the ICA. The Commission approved the Agreement on June 28, 2000. The parties' agreement changed the billing DMOQ to B-4, "Billing Accuracy – Adjustments for Errors." The measure was described in total as "Total Revenue Billed Without Error/Total Billed Revenue Billed in the Reporting Period."^[36]

4. On December 4, 2000, Qwest and Eschelon entered into the Eighth Amendment to the parties' ICA. The Amendment was approved by the Commission on January 26, 2001. Pursuant to the Amendment, Qwest agreed to provide Eschelon with a platform product that Qwest initially referred to as UNE-E, now known as UNE-Star.^[37]

5. Qwest agreed to convert Eschelon's resale base to UNE-E but could not complete the conversion. From the start, Eschelon was billed for UNE-E at a resale rate, the billed resale revenues were manually compared to the lower UNE-E rates, and then Qwest sent a revised billing. The process was intended to be temporary.^[38]

6. From February, 2000 through March, 2001, Eschelon and Qwest entered into a series of agreements settling disputed issues, including billing DMOQs.

7. In March 2002, Qwest and Eschelon reached a settlement of certain claims and resolved Eschelon's billing issues through February, 2002.^[39] That settlement stated: "With respect to measurement of B-4, parties agree to collaboratively determine the dollar value of billing that is disputed prior to [Eschelon's] claim for credits being made." It also stated: "Qwest shall make the UNE-E offering and existing business processes related to the UNE-E offering available to Eschelon through the current term of the [ICA] Amendment Terms dated November 15, 2000."^[40]

8. The March settlement acknowledged that the UNE-E conversion had not been implemented. It stated in part:

(f) Within ten days of the Effective Date, the Parties shall form a joint team. The purpose of the joint team shall be to develop a mutually acceptable plan (the "Plan") to convert UNE-E lines to UNE-P. Qwest and Eschelon shall use best efforts to cooperate in converting UNE-E lines to UNE-P in accordance with the plan.

(g) Qwest and Eschelon shall work closely together in moving Eschelon from a manual to a mechanized process so that Eschelon can bill for access on UNE-P. ... If the parties are unable to agree on the date of the termination of the manual process, then the parties shall follow the procedures described in paragraph 8 below.^[41]

9. Paragraph 8 of the settlement preserves each party's legal remedies.^[42]

10. Eschelon has submitted requests to Qwest for performance billing credits for alleged 100% UNE-E billing inaccuracies from March through December, 2002.^[43]

Qwest has refused to pay DMOQ credits because it denies that its billings have been inaccurate.

11. The billing process involves multiple steps. Initially, Qwest notifies Eschelon of the amount that would be billed under the resale rates minus the wholesale discount. It does not reflect UNE-E rates. Several weeks later, Qwest applies the UNE-E prices and submits a revised version to Eschelon, reducing the resale rates to the amount Qwest estimates is owed.^[44] Eschelon receives the initial billing, makes its own estimated adjustment, and then reconciles its estimate with Qwest's later billing. At that point, Eschelon attempts to "true-up" its estimate and the figure provided by Qwest. It brings disputed items to Qwest's attention, and the figures are reconciled. Qwest and Eschelon have handled monthly bills in this way since UNE-E was offered.^[45] Qwest adjusts the Eschelon UNE-E bill prior to the bill becoming payable.^[46]

12. Qwest acknowledges that Eschelon has disputed the billings even after receiving the UNE-E adjustment. For each month included in Qwest's Exhibit ECM-03, Qwest decreased its billing after addressing Eschelon's concerns.^[47] It is not clear from the record if Qwest made similar adjustments in the other disputed months.

13. As part of the MPUC proceeding to address Qwest's application for long distance authority, Qwest's billing accuracy was addressed. The ALJ concluded that "UNE Star does not meet the standards for UNE-P offering (particularly with respect to billing accuracy....)" This finding was made in the context of evaluating Qwest's compliance with an FCC checklist to determine if Qwest was providing nondiscriminatory access to its Operational Support Systems (OSS).^[48] The ALJ evaluated the adequacy of Qwest's operating support system to support competition. The ALJ did not interpret the contractual agreements between Eschelon and Qwest.

14. Eschelon requests billing credits of \$105,048.^[49]

DISCUSSION

Eschelon has alleged that Qwest's failure to accurately bill for UNE-E constitutes an error and triggers the DMOQ calculation. Qwest acknowledges that the first notice sent to Eschelon for each month of service reflects resale prices and not UNE-E prices. However, Qwest argues that this notice is not a bill because it does not state the amount that Eschelon is expected to pay. Eschelon agrees that it uses the first figure to estimate what its bill will be. Several weeks later Qwest sends Eschelon a corrected billing, accounting for the decrease from resale to UNE-E rates. Eschelon takes the position that the first notice is the bill and it is always wrong.

Thus, the question is whether Qwest has a contractual obligation to send an accurate billing in the first instance rather than continuing to follow the two-step process, and whether its failure to do so triggers the DMOQ calculation.

The ICA and the March 1, 2000, Stipulation and Agreement set performance standards. Qwest was not able to mechanize its billing so that Eschelon would receive a timely, accurate bill of UNE-E services. Periodic settlements addressed

the system inadequacies. However the settlement reached in March 2002 changed the parties' agreement concerning billing accuracy. In light of the language of the 2002 settlement, Eschelon's argument is not persuasive. Eschelon agreed to the continuation of existing practices generally, and, to work cooperatively with Qwest to convert the UNE-E lines to UNE-P. Qwest and Eschelon specifically agreed to "collaboratively determine the dollar value of billing that is disputed prior to [Eschelon's] claim for credits being made."^[50] They also agreed to "work closely together in moving Eschelon from a manual to a mechanized process so that Eschelon can bill for access on UNE-P."^[51] If the parties could not agree on the date for termination of the manual process, the parties each preserved their legal remedies.^[52]

Thus, in March 2002 the parties agreed that mechanized billing was not available, and that they would work together to complete mechanized billing. Nothing in the settlement would penalize Qwest for successive months without mechanized billing, and it does not set a date certain for completion.

The practice in place in 2002 at the time of the settlement was for Qwest to provide an initial estimate based on resale rates and to provide a revised estimate weeks later. Eschelon does not assert that Qwest required Eschelon to pay the first estimate. It is apparent that neither party considered the first estimate to be Eschelon's bill for UNE-E. It is less clear whether the amounts in dispute following the revised estimate should serve as basis for calculating the DMOQ, but neither party has addressed that question. Qwest has acknowledged that for four of the months at issue, Eschelon disputed the revised estimate, and that Qwest made further deductions to resolve those disputes.^[53] Eschelon has not claimed that there were unresolved disputes.

Although Qwest's initial billings were not accurate, Eschelon agreed in March 2002 to allow the flawed billing process to continue. Thus it has failed to show that it is eligible for the DMOQ credits.

Eschelon relies in part upon other cases that have addressed the adequacy of Qwest's billing practices. But none are relevant to this dispute. It is apparent in this case, like the others, that Qwest has been unable to resolve its billing problems. However, the question in this case is not whether Qwest is able to issue an accurate, current bill but whether the settlement entered by Qwest and Eschelon in 2002 affects the calculation of DMOQ credits for the system's failings.

In the MPUC's investigation of Qwest's 271 filing the issue was whether Qwest had the necessary billing systems in place to meet the FCC's requirement for accurate, timely bills. The ALJ found that Qwest could not support competition in commercial volume. The multi-step approach did not meet that test.^[54]

Although the Arizona Corporation Commission also addressed the accuracy of Qwest's billing to Eschelon, that proceeding was also in the context of a section 271 proceeding to determine Qwest's capacity to support competition. Like

Minnesota, Arizona concluded that the billing efforts were inadequate. The agreements entered between Qwest and Eschelon were not addressed.^[55]

Qwest's track record for providing accurate, timely billings is poor. That is apparent from the series of successive approximations for each month. However, the settlement in March 2002 acknowledged the problem and Eschelon essentially agreed to live with it for an indefinite period.

BJH

^[1] 47 U.S. C. § 252 (e).

^[2] Docket No. P-5340, 421/M-99-1223, October 4, 1999.

^[3] Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1995); Louwgie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500 K; Minn.R.Civ.P. 56.03.

^[4] See Minn. R. 1400.6600.

^[5] Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

^[6] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).

^[7] Eschelon's Initial Brief, Ex. C-1, ¶ 39.1. At the time the Interconnection Agreement was signed, Eschelon was known as Cady Telemanagement, Inc. (CMTI), and Qwest was known as U S West Communications, Inc. (USWC).

^[8] Ex. C-1 at 39.

^[9] Ex. C-1 at 40.

^[10] Id. at Attachment.

^[11] Ex. C-2.

^[12] Ex. C-2 at 2, ¶ 1.1.3; at 11, ¶ 5; and at 12, ¶ 6.2.5.

^[13] Ex. C-2 at 11-12, ¶ 6.1.

^[14] For "48 Volt DC Power Cable, per foot, per A and B feeder, 40 Ampere Capacity" the recurring charge was \$0.15 and non-recurring was \$89.34. Ex. C-2 at Attachment B. The non-recurring price set for preparation of cageless physical collocations is "ICB," Individual Case Based. During this time period it was \$4,644.90 per bay. Affidavit of D.G. Williams, attached to Qwest's Initial Brief.

^[15] Ex. C-2 at 21, ¶ 21.1.

^[16] PUC Docket No. P-442, 5321,3167,466,421/CI-96-1540 (Generic Cost Docket).

^[17] Eschelon's Initial Brief, f.n. 5.

^[18] Ex. C-3 at 1-2; This is now a public document, See PUC Docket No. P-421/C-02-197.

^[19] C-3 at 2.

^[20] Qwest's Initial Brief at 5; Eschelon's Initial Brief at 5-6.

^[21] In the Matter of Onvoy, Inc.'s Complaint Against Qwest and Request for Expedited Hearing, PUC Docket No. P-421/CI-01-1896, Notice and Order for Hearing, February 11, 2002.

^[22] PUC Docket No. P-421/C-01-1896.

^[23] PUC Docket Nos. P-421-CI-01-1375; P-442,421,3012/M-01-1916 (1375 Generic Cost Proceeding).

^[24] Department Response to Qwest Motion, Ex. 1.

^[25] Eschelon's Initial Brief at 10.

^[26] Exhs. C-6 through C-11.

^[27] Ex. C-2 at 2, ¶ 1.1.3, at 11, ¶ 6.2.5, and Attachment B.

^[28] Ex. C-2 at 11-12, ¶ 6.1.

^[29] Id.

^[30] Ex. C-2 at 21, ¶ 21.1.

^[31] PUC Docket No. P-442,5321, 3167,466, 421/C1-96-1540.

^[32] In the Matter of Onvoy, Inc's Complaint Against Qwest and Request for Expedited Hearing (Onvoy), PUC Docket No. P-421/C1-01-1896, OAH Docket NO. 58-2500-14732-2, findings of Fact Nos. 11-13, 17, 27, 53, 62, 84.

^[33] Onvoy, ALJ Report at 25, ¶ 7.

^[34] 47 U.S.C. § 251(c)(2)(1) and (c)(6).

^[35] Eschelon Complaint, Ex. B-1, at 14.

^[36] Eschelon Complaint, Ex. B-2.

^[37] Eschelon Complaint, Ex. B-6.

^[38] Eschelon Complaint, at 9, ¶ 7; Qwest Response to Complaint, ¶ 34. Qwest Initial Brief at 14-15.

^[39] Eschelon's Initial Brief at 15, Ex. D-10; Qwest's Initial Brief at 20, Ex. ECM-4.

^[40] Eschelon's Initial Brief, Ex. D-10 at 3; Qwest's Initial Brief, Ex. ECM-4 at 3.

^[41] Eschelon's Initial Brief, Ex. D-10 at 3; Qwest's Initial Brief, Ex. ECM-O4 at 3.

^[42] Ex. ECM-04 at 4.

^[43] Affidavit of William D. Markert, ¶ 3, states that the months in dispute are March-September and November-December 2002; See also Eschelon's Initial Brief, f.n. 3.

^[44] Qwest's Initial Brief at 15.

^[45] Department's Reply Brief, Ex. 2 (Affidavit of Ellen Copley), ¶ 4; Qwest's Initial Brief, Affidavit of Elmer Craig Morris, ¶ 6, and ECM-03 (contains trade secret data).

^[46] Qwest's Initial Brief, Affidavit of Elmer Craig Morris, ¶ 5.

^[47] See also Qwest's Initial Brief, Ex. ECM-05 (contains trade secret data).

^[48] In the Matter of a Commission Investigation into Qwest's Compliance with Section 271 (c) (2)(B) of the Telecommunications Act of 1996: Checklist Items 1,2,4,5,6,11,13,and 14, P-421/CI-01-1371, Findings of Fact, Conclusions of Law and Recommendations (January 24, 2003), at 5.

^[49] Eschelon Complaint at 8, ¶ 4.

^[50] Eschelon's Initial Brief, Ex. D-10; Qwest's Initial Brief, Ex. ECM-4 at 3 (emphasis added).

^[51] Eschelon's Initial Brief, Ex. D-10 at 3; Qwest's Initial Brief, Ex. ECM-04 at 3.

^[52] Ex. ECM-04 at 4.

^[53] Qwest's Initial Brief, Ex. ECM-05 (contains trade secret data).

^[54] In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) etc.; Eschelon Reply Brief, Ex. E-5. OAH Docket No. 7-2500-14486-2, PUC docket No. P-421/CI-01-1371.

^[55] Eschelon's Reply Brief, Ex. E-6, AZ. Corp. Comm'n Docket No. T-00000A-97-0238 (September 16, 2003).